Denver Law Review

Volume 9 | Issue 6 Article 4

July 2021

Acceptance of an Offer for a Unilateral Contract (Acceptance by Overt Act) - A Comment Upon the Restatement

Stanley H. Johnson

ACCEPTANCE OF AN OFFER FOR A UNILATERAL CONTRACT

(ACCEPTANCE BY OVERT ACT)—A Comment upon the Restatement

Stanley H. Johnson, Judge of the Juvenile Court

"UNILATERAL contract" is a misleading expression, owing to its literal implication that a contract may be one sided. Supposedly, it is a fundamental premise that gratuitous promises are not enforceable, in spite of the unfortunate rule which has arisen in recent years allowing an action upon promises to contribute to building funds for charitable purposes, not supported by any apparent consideration. *Young Men's Christian Association vs. Estill,* 140 Ga. 291. Of course, it is still possible to excite an argument in a layman, or an embryonic student, by a flat statement that such is the law, but the eager answer is based upon feelings of policy no longer open to one whose mind has been attuned to the habit of legal thought. It does not signify in what manner I express my careless gift of words, so long as I do not mislead a reasonable promisee into the belief that my words import a consideration: whether I say, "I will *give* you $1,000 *toward* a European trip," or "I *promise to pay* you $1,000, *if you will* go to Europe," providing that you reasonably understand it is nothing to me whether you go on a pleasure trip, or continue to starve at your professional labors.

The recipient of such an offer may ruin himself in reliance upon it without redress in court. This was the case of the widow Kirksey (8 Ala. 131), who gave up her homestead at the request of her open-handed, but short tempered, brother-in-law. The weakness of her case did not lie in the failure of the parties' minds to meet, as the court put it in the discredited case of *Cooke vs. Oxley,* K. B. 1790, 3 Term Rep. 653, and in scores of American cases still in full credit, but rather because her brother-in-law's promise to provide a home for her upon his property would not have indicated to the illusive reason-

NOTE: All of the cases cited herein may be found in Corbin's Cases on Contracts, and most of them in Williston's casebook.

able person that her surrendering her homestead and moving to his premises was any consideration to him.

Such promises as this in an earlier day were described as "unilateral" or picturesquely as "mere naked promises", using either expression in the sense to indicate that there was no quid pro quo. *High Wheel Auto Parts Co. vs. Journal Co.,* 50 Ind. App. 396, 98 N. E. 442. But, largely perhaps, through the influence of Professor Williston, the expression unilateral, in spite of the literal inaccuracy, means today that the promise contained in the offer is to be accepted, and a contract entered into, by means of an act, as distinguished from a verbal promise. In place of unilateral, therefore, one should picture a contract with a promise on one side only, upon the other side an act.

Courts of common law are no more firmly wedded to the proposition that gratuitous promises are unenforceable than they are to the rule that in enforcing contracts, they are merely giving binding effect to the apparent intent of the parties, as in the "Peerless" case. I Williston No. 73. We find this expressed very positively in the Restatement of the Law of Contracts by The American Law Institute, Secs. 3, 19b, 20, 25, 52, and 55. It is a platitude that an offeror, so long as he makes his meaning clear, may make as ridiculous or unlikely an offer as he pleases, one, in fact, which cannot be accepted. And it has always been acknowledged, generally speaking, that to create a contract, the offeree must accept the offer according to its terms, or, as the Restatement puts it in Sec. 59, "(Except as this rule is qualified by Sections 45, 63, 72), an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested. (The parentheses are mine). Sec. 63 excepts instances where the offer calls for a promise from the offeree, but where the latter does or tenders the act which he should have promised, within the specified time. This exception will be pardoned by most for its departure from the general rule, upon the ground that the offeror is getting something better than he called for,—not merely a promise, but the act called for in the promise. This variance from the offeror's intent, due to the usual "practical policy", demands your close scrutiny. At least, the circumstances surrounding performance

should be such as to indicate a clear intention upon the part of the offeree to accept the offer. *White vs. Corlies,* 46 N. Y. 467. Section 72 excepts the much discussed acceptances by silence and inaction. It is, however, Sec. 45 which gaves rise to this article.

That section conceals in its sweeping declaration a compromise to lawyers upon a very muddled legal problem. It states: "If an offer for a unilateral contract is made, and *part of the consideration requested* in the offer is given or tendered by the offeree in response thereto, *the offeror is bound by a contract,* the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

The theme of this article is that this statement is not a statement of the law, that it is opposed to the fundamental rules upon the formation of contracts, and further, that its language is contradictory. It is surprising to find Professor Williston drawn into such a declaration, after one has heard and read his attacks upon judicial efforts to compromise the problem. I Williston No. 60, 60A, 68, and 73. These compromises will be mentioned later.

One objection to Sec. 45 is the attempt to cover all the diversified types of unilateral contracts by one blanket rule, although it is apparent that there are several different kinds of contracts of this character. But the chief defect lies in the two phrases: "part of the consideration requested" and "the offeror is bound by a contract." The first phrase is objectionable because it fails to recognize that ordinarily the consideration for an offer looking toward a unilateral contract is the completed act requested, and that preliminary steps toward the fulfillment of the act are not divisible parts. The second phrase is more seriously defective, in my opinion, because it holds the offeror bound to the unilateral contract, which, however, has no binding effect upon the offeree,—a legal anomaly. There is no dispute, of course, over the proposition that offers for such contracts are made, and the act of acceptance begun, under such circumstances that it is the apparent intention of both that neither may withdraw. But in such instances the contract by which *both* parties are bound is

not the major unilateral contract, but a preliminary bi-lateral contract to enter into a unilateral contract,—in other words, a double option, not verbally expressed, but necessarily implied from the acts of the parties and the surrounding circumstances. But this is not to say that all offers for unilateral contracts are of this nature.

This distinction is more easily demonstrated by examples:

1. A offers the public (B) $500 for information leading to the arrest and conviction of C for murder.
2. A offers B $500 to plough A's field.
3. A offers B $500 to evolve a chemical formula of use in A's business.
4. A offers B $500 to install adequate hot water plumbing in A's house.
5. A offers to provide B with room and board and to devise his house to B on his death, if B will come to live with A and take care of A until his death.

The intention in the language of the Restatement seems to be that any preliminary act of the offeree toward acceptance will bind the offeree to a contract. Yet, clearly, the first example is of the kind in which no preliminary act of the offeree will bind A at all. The meaning of A's offer is clearly full performance, and nothing less. *Shuey vs. U. S.*, 92 U. S. 73. Although I believe that in none of these examples is the consideration divisible, it is possible to find in the second and fifth examples a certain value to A in part performance. In the third and fourth examples, there clearly is none, although in both there will be injury to either party, if the other withdraw. It is worth noting, at this point, however, that the promisee of a gratuitous offer may also be greatly injured, and further, that in any of the above examples the circumstances may disclose an apparent intention upon the part of A not to be bound to anything until full performance is given, or, on the other hand, that *both* shall be bound as soon as work is commenced. It is improbable that A should intend in the ordinary contract to be bound by preliminary acts of B without a corresponding duty on B's part not to withdraw, although it must be admitted such a situation might exist.

One naturally seeks authority for the startling statement in Sec. 45, in view of the fact that A has not received what he

bargained for. One wonders further whether there has not been created a unilateral contract in the old sense. The Institute assumes, in the face of A's express demand for full performance, that A asks for two things: beginning performance and completing performance. Partial consideration may be regarded as a legal paradox, except in cases where it is the unmistakable intention of both parties that B's beginning performance shall bind A to an option. I Williston No. 102, 115.

Reverting for the moment to Sec. 63, we find the offeree protected for reasons of policy where B has given, not the promise of A asked for, but the act to be promised. It appears that in the eyes of the law the accomplished fact is as good as, if not better than, the potential fact contained in the promise. B's word may be good but his act is better. In Sec. 45, however, it pleases the Institute to disregard policy, for here, where A has distinctly demanded the accomplished fact, we find that he is given only the most infinitesimal part of that fact, and not even the word of B upon which to sue. It may be said that if A is asking, for his own protection, the act from B, instead of B's mere promise, he should have it. Or else it may be said that in giving rights of action upon contract, we are tending to disregard the express intention of the parties and affirming by rule, arbitrarily what A may have and what he may not.

Examples of judicial paternalism are frequent. Courts are prone to protect, at least in fairly well defined fields, the foolish contractor from his folly. Witness the strange Massachusetts rule for builders who have made a bad bargain, now firmly established in *Munroe vs. Perkins,* 9 Pick. 298, 20 Am. Dec. 475. But the Institute in Sec. 45 would wipe out the elemental rule in all cases of unilateral contract.

It is easy to find the reason for the adoption of this section in many of the decided cases. Unilateral contracts, if the elemental rule is to be enforced, are hard cases, frequently, from the offeree's point of view, and like other "hard cases", have given rise to "bad law". Instances are given in Williston's treatise of the effort courts have made to protect the offeree by the following false conclusions:

1. By promissory estoppel, a dangerous fiction; estoppel is predicated upon a misstatement of fact, but even if A's

promise is regarded as a fact, wherein is the misrepresentation?

2. By implying in A's offer a request for acceptance by promise, rather than by act, and by implying in B's first efforts the promise supposed to be called for—a double fiction.

3. That part performance, as stated in the Restatement, is consideration, or in other words by the bald statement that the offeree has performed, when in fact, he has not.

Such decisions justify the conventional statue of Justice blindfolded, so irritating to the conscientious lawyer. One example of such a ruling is sufficient. In *Brackenbury vs. Hodgkin,* 116 Me. 399, 102 Atl. 106 (1917) A, an old lady owning a farm in Maine, wrote to her married daughter, living in Missouri, that if the latter would move to Maine and take care of her till her death, the daughter paying the moving expenses, she would allow the daughter the use and income of the property and leave her the farm upon the mother's death. After the daughter had gone to the trouble and expense of moving and had lived with her mother a few weeks, trouble developed between them, and the daughter was asked to move. The mother then conveyed the property to her son. The action was really a proceeding in equity for reconveyance to the mother, and an injunction, but is of course decided upon principles of contract.

One readily sees the injustice if the mother is allowed to prevail. Truly, a "hard case." But it is dealt with summarily in a terse opinion. The court is clear as to the nature of the contract:

"The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract, requiring an act for a promise. In other words the promise becomes binding *when the act is performed."*

Then follows immediately the curious conclusion that, "The plaintiffs here accepted the offer by moving from Missouri to the mother's farm in Lewiston and *entering upon* the performance of the specified acts, and they have continued performance since that time so far as they have been permitted by the mother to do so. The existence of a *completed* and valid contract is clear."

There is no denial that some remedy should be given the plaintiff; it is submitted that an action for the reasonable value of the services would include every act of the plaintiff. But the court, although it states that a complete contract exists, would surely have hesitated to give the mother damages for breach had the daughter and her husband voluntarily moved out and returned to Missouri. Like Sec. 45 of the restatement, the court in effect implies a promise by the offeror not to revoke, in consideration of the offeree's trouble in getting under weigh.

In this and other similar cases the court's heart is with the offeree. But, in fact, if policy is to be considered, the offeror's position is not to be ignored. He asks for and wants full performance. Contracts should be free expressions of intent. The offeree, if we forget the habitual and dismal ignorance of contractors, may always counter-offer a demand for a written bi-lateral contract, a much simpler thing for the court to construe, unless it is the apparent intention of both parties that neither shall withdraw until full completion of the contract, or unless there is a clear intention that the preliminary acts of the offeree shall bind the offeror to an option, it should be held that the offeror is not bound to perform his promise, until the offeree has performed in full. I Williston No. 60, 60A.

It seems that advancing paternalism in judicial decision does not give that certainty to business which the law of contracts, within the necessary limitations of thought and language, should give. It will be frequently found that the desire to "give justice" to one, may result in patent injustice to the other. The following quotation from an article by Sir Frederick Pollock is unlawyerlike, and far more irrational than the language of Professor Ashley which he criticizes:

"One or two seem to us really paradoxical, as where he (Ashley) maintains that in a unilateral contract, where a promise is offered for an act requiring an appreciable time for performance, there is no consideration for the promise until the act is completed. If this be so, the promisor may withdraw his offer when the work is all but done, or the promisee may capriciously leave the work half done, and in either case without remedy, unless there be something in the circum-

stances which can be made to support an action of tort. Both the plain man and the average lawyer will say that whatever Professor Ashley's logic may be, the law cannot really be as absurd as that; and they will be right, and what is more, any *rational* court before whom such a question is moved *will surely find a way to make them so.*"

I have already stated in the opening paragraph, as a matter of my experience, that the "plain" man, and at least the embryonic lawyer will make the same statement regarding the law's absurdity in connection with the common law rule that gratuitous promises are unenforceable, but I think that is no reason for a court to manufacture its own law to take care of the plain man's complaint. If courts are to be turned to the layman's view by the layman's complaint, then there is an end of the common law with its labyrinth of rules produced through centuries of painful thought and experience. At least, I should not care to designate Pollock's imaginary court as rational, but should incline to borrow Professor Manly Hudson's expression, that it was stimulated by a visceral sensation.

LOST, STRAYED OR ——

Judge Denison cannot find his 72 Colorado. If any one has better luck kindly notify the Judge.

Justice, as a moral habit, is that tendency of the will and mode of conduct which refrains from disturbing the lives and interests of others, and, as far as possible, hinders such interference on the part of others. This virtue springs from the individual's respect for his fellows as ends in themselves and as his co-equals. The different spheres of interests may be roughly classified as follows: body and life; the family, or the extended individual life; property, or the totality of the instruments of action; honor, or the ideal existence; and finally freedom, or the possibility of fashioning one's life as an end in itself. The law defends these different spheres, thus giving rise to a corresponding number of spheres of rights, each being protected by a prohibition. . . . To violate the rights, to interfere with the interests of the neighbor; it is an open avowal that the latter is not an end in itself, having the same value as the individual's own life. The general formula of the duty of justice may therefore be stated as follows: Do no wrong yourself, and permit no wrong to be done, so far as lies in your power; or, expressed positively: Respect and protect the right.—*Paulsen.*